



**Upper Tribunal
(Immigration and Asylum Chamber)**

Saimon (Cart Review: “pending”) [2017] UKUT 00371 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

On 25 July 2017

**Decision & Reasons
Promulgated**

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Before

**MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE COKER**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MD JAKIR HUSSAN SAIMON
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer

For the Respondent: Mr P Saini, instructed by Londonium, Solicitors

An appeal in respect of which a Cart judicial review has quashed a refusal of permission to appeal is again “pending” within the meaning of s.104(2)(a) of the 2002 Act.

DETERMINATION AND REASONS

1. In this case the appellant appealed to the First-tier Tribunal against a decision of 9 December 2013 to refuse to vary his leave and give

directions for his removal. Judge Turquet dismissed that appeal in the First-tier Tribunal. The appellant then sought permission to appeal to this Tribunal. Permission was refused on application to the First-tier Tribunal by First-tier Tribunal Judge Ford and on reapplication to the Upper Tribunal by Upper Tribunal Judge Freeman. The appellant then brought judicial review proceedings challenging the decision of Judge Freeman. Those proceedings were successful in the sense that the High Court was persuaded that the decision of Judge Freeman should be quashed. The order of the Court is signed by the judge and sealed on 13 May 2015. Some time in August 2015 the appellant left the United Kingdom.

2. No further action appears to have been taken until the matter was listed before Judge Canavan in this Tribunal. Her decision is dated 12 January 2017. On that date she (a) “for the avoidance of doubt” granted permission to appeal to this Tribunal and (b) decided that the appeal had been abandoned by the appellant’s departure from the United Kingdom about eighteen months previously. There is now before us an application for permission to appeal against, or for review of, that decision.
3. The question that arises in relation to this appeal is whether the appellant’s departure from the United Kingdom caused his appeal to be abandoned. If so, then since that date the Tribunal has had no jurisdiction to deal with it.
4. There has been some difficulty, identified by Mr Saini, who appears for the appellant, in determining precisely which provisions of the 2002 Act as amended or as not amended, apply to this appeal. There is, in our judgment, no doubt that bearing in mind the date of the Secretary of State’s decision, the un-amended provisions of s 104 of the 2002 Act (before amendment by the 2014 Act) have effect. In the Immigration Act 2014 (Commencement No.3, Transitional and Saving Provisions) Order 2014, SI 2771/2014 the whole of part V of the 2002 Act (containing sections 81 to 117) is part of the group of provisions called by art 1(2)(e) of that order the “saved provisions”. The effect of part II of the order is that the saved provisions remain in force in relation to appeals against what may be described as “old decisions” of the Secretary of State and there is, no doubt, that the decision which the appellant in this case sought to appeal was for those purposes an “old decision”. It follows that the provisions of s 104 before amendment in 2014 apply to this case. If the appellant left the United Kingdom while his appeal was pending then it is to be treated as abandoned. We should say that if the amended provisions applied it appears that the same effect would be caused by s 92(8) of the 2002 Act (as amended).
5. The question therefore is the extent of the application of s 104 to this appeal. The relevant provisions read as follows:

“104 pending appeal

- (1) An appeal under section 82(1) is pending during the period –
 - (a) beginning when it is instituted, and

(b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99).

(2) An appeal under section 82(1) is not finally determined for the purpose of subsection (1)(b) while –

(a) an application for permission to appeal under section 11 or 13 of the Tribunals, Courts and Enforcement Act 2007 could be made or is awaiting determination,

(b) permission to appeal under either of those sections has been granted and the appeal is awaiting determination, or

(c) an appeal has been remitted under section 12 or 14 of that Act and is awaiting determination.”

6. Those provisions, we should say, were inserted into the Act from 15 February 2010 as a result of the migration of the Immigration Tribunal system into the system established by the Tribunals, Courts and Enforcement Act 2007. As we have indicated, the history of this appeal is that there was a determination of the application for permission to appeal to the Upper Tribunal which was made by Judge Freeman and, if it had not been challenged would, as we accept, have been the final determination in this appeal. However, what happened subsequently was that Judge Freeman’s decision was quashed; and it was after that that the appellant left the United Kingdom. Mr Saini has done his very best to persuade us that following the decision of Judge Freeman the appeal subsequently had to be regarded as finally determined and therefore no longer pending, whatever happened.

7. We have the very gravest of difficulty in accepting that submission. We should say that nothing decided here should be taken as a decision as to whether an appeal is pending after a decision of the Upper Tribunal refusing permission to appeal has been given but before it has been quashed in any judicial review proceedings brought in respect of it. During that time we agree with Mr Saini that it may be rather difficult to say that the appeal is pending: but we make no decision on that. That is not this case. In this case the question is whether the appeal was pending at the time when the appellant left the United Kingdom, which was *after* Judge Freeman’s decision had been quashed. The effect of the quashing of Judge Freeman’s decision was that from 13 May 2015 the position was that there had been no lawful determination of the application for permission to appeal made to the Upper Tribunal. That application, previously thought to have been determined, was now awaiting decision or determination. Indeed, in proceedings before this Tribunal, Judge Canavan granted permission. If she had not done so, the appeal could not be before us. But she could only do so on the basis there was, following the judgment of the High Court, an application for permission outstanding and awaiting determination.

8. Although the argument put by Mr Saini might have effect if confined to the interpretation of s 104(1)(b), it simply cannot stand, in our judgment, against 104(2) because leaving out the words which do not apply precisely

to this appeal, the position is that “an appeal under s 82(1) is not finally determined for the purposes of sub-s 1(b) while an application for permission under s 11 of the 2002 Act is awaiting determination”. That is precisely the position of this appeal, following the 13 May 2015 decision of the High Court; the application for permission was awaiting determination, the determination which was in due course apparently made by Judge Canavan on 11 January 2017.

9. It follows that the appeal was pending at the time when the appellant left the United Kingdom in August 2015. By leaving the United Kingdom he abandoned his appeal and since that date there has been no appeal before the Tribunal; it fell to be treated as abandoned from that date. All subsequent proceedings in it are therefore invalid and the position is that the appeal having been abandoned, the appeal to us cannot succeed.
10. We therefore refuse permission to appeal to the Court of Appeal. It follows that no proceedings in the Tribunal since August 2015 can be valid and whatever be the precise position in relation to decisions made by Judge Canavan, the appeal is to be treated as abandoned from that date.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 8 August 2017